

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

RICHARD HARVEY,

Petitioner,

v.

PAUL THOMPSON, et al.,

Respondents.

No. 2:21-CV-1865-KJM-DMC-P

FINDINGS AND RECOMMENDATIONS

Petitioner, a federal prisoner proceeding pro se, brings this petition for a writ of habeas corpus under 28 U.S.C. § 2241. Pending before the Court is Respondents' motion to dismiss. See ECF No. 6.

I. BACKGROUND

Petitioner is a federal prisoner incarcerated at the Federal Correctional Institution – Herlong. See ECF No. 1, pg. 1. Petitioner claims that he is entitled to relief under the First Step Act (FSA) of 2018 in the form of additional credits and, as a result, expedited release. See id. at 6-7.

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II. DISCUSSION

Respondents contend the Court should dismiss the petition. By way of background, Respondents offer the following summary of the relevant provisions of the FSA:

On December 21, 2018, Congress enacted the FSA to prescribe criminal justice reform. *See* Pub. L. No. 115-391, 132 Stat. 5194. The U.S. Department of Justice, under BOP [Bureau of Prisons], was permitted 210 days to develop and then publicly release a risk and needs assessment system to assess inmates' risk of recidivism. *See* 18 U.S.C. § 3632(a). BOP timely published its risk and needs assessment system on July 19, 2019; BOP timely implemented and completed initial intake risk and needs assessment for each inmate before January 15, 2020. Pursuant to 18 U.S.C. § 3621(h)(1)(A), BOP assigns inmates to appropriate evidence-based recidivism reduction programs based on that determination.

Against this background, as a matter of law, BOP has two years to "phase-in" programming and provide "evidenced-based recidivism reduction programs and productive activities for all prisoners. . . ." *Id.* § 3621(h)(2)(A-B). Under FSA, federal inmates, such as Petitioner, who qualify and who "successfully complete evidence-based recidivism reduction programming or productive activities, shall earn time credits." *Id.* § 3632(d)(4)(A). These credits can accrue at the rate of "10 days of time credits for every 30 days of successful participation in evidence-based recidivism programming or productive activities." *Id.* § 3632(d)(4)(A)(i). Some federal inmates who are scored at a low or minimum risk of recidivating, and who have not increased this risk over a period of two consecutive assessments, will earn an additional 5 days of time credits for every 30 days of successfully [sic] participation. *Id.* § 3632(d)(4)(A)(ii). The award of any credits is *not retroactive* to any programs successfully completed "prior to the date of enactment of this subchapter." *Id.* § 3632(d)(4)(B).

ECF No. 6, pg. 3-4.

Respondents contend that the petition should be dismissed because Petitioner has failed to exhaust administrative remedies before filing this action. Respondents also argue that Petitioner fails to state a claim upon which relief can be granted because the Bureau of Prisons (BOP) has sole discretion to place an inmate in end-of-sentence transition programs. For the reasons addressed below, this Court finds these arguments persuasive.

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1 **A. Exhaustion of Administrative Remedies**

2 Respondents contend the Court should dismiss the case because Petitioner failed to
3 exhaust administrative remedies. Petitioner argues in response that he need not exhaust
4 administrative remedies in this case, citing to Coleman v. U.S. Parole Comm’n, 644 Fed. Appx.
5 159, 162 (3d Cir. 2016), and Fraley v. U.S. Bureau of Prisons, 1 F.3d 924 (9th Cir. 1991). See
6 ECF No. 7. The Court does not agree.

7 These cases excused petitioners from exhausting administrative remedies only
8 when it was clear that no further administrative action would yield any results. Furthermore, in
9 Fraley the petitioner did attempt pursue remedies before being denied relief based on official
10 agency policy, rendering further administrative proceedings futile. Fraley, 1 F.3d at 925. In this
11 case, especially now that the phase-in period to begin granting earned-time credit has expired, it is
12 entirely plausible that administrative remedies may result in the reward of good-time credit.
13 Therefore, Colman and Fraley are distinguishable on, thus, not persuasive in this case.

14 Petitioner also references Goodman v. Ortiz, 2020 U.S. Dist. LEXIS 153874
15 (D.N.J. 2020), which declined to dismiss another habeas corpus petition on the issue of earned-
16 time credits for failure to exhaust. This holding, however, was based on the premise that the
17 petitioner in Goodman was presenting a question of pure statutory interpretation, see id. at *6,
18 and this Court notes that Goodman has been questioned by other courts in this circuit, see e.g.,
19 Phares v. Bradley, 2021 U.S. Dist. LEXIS 156881, *24-25 (C.D. Cal. 2021) (declining to waive
20 exhaustion because factual claims existed that required a record to resolve); Lister v. Gatt, U.S.
21 Dist. LEXIS 181277, *6 (C.D. Cal. 2021) (declining to waive exhaustion due to factual questions
22 and bypass of agency’s chance at providing remedy); Esqueda-Cortez v. Thompson, 2022 U.S.
23 Dist. LEXIS 63680, *7 (E.D. Cal. 2022) (declining to waive exhaustion due to factual questions).

24 Here, as in the cases above, Petitioner contends that he has participated in at least
25 some programming that should count towards earned-time credits and that he has not been
26 awarded those credits. See ECF No. 7. Whether Petitioner has participated in any activities
27 which could entitle him to earned-time credit, and whether those credits should have already been
28 calculated and applied, are exactly the types of factual questions that extend beyond statutory

1 construction and require a developed record for this Court to consider. Additionally, if Petitioner
2 is now entitled to earned-time credits, Respondent should be given an opportunity to resolve the
3 issue for the sake of executive branch administrative independence and judicial branch efficiency.

4 The Court thus finds that relief under 28 U.S.C. § 2241 is not appropriate at this
5 time because Petitioner has not exhausted administrative remedies which might result in
6 resolution of this case without Court intervention.

7 **B. Failure to State a Claim**

8 At footnote one of the motion to dismiss, Respondents argue Petitioner fails to
9 state a claim upon which relief can be granted because Petitioner seeks to compel a discretionary
10 act. According to Respondent:

11 This Court lacks jurisdiction to review BOP discretionary,
12 individualized, decisions concerning release to home confinement and
13 application of time credits. As a matter of law, 34 U.S.C. § 60541(g)
14 grants to *the Attorney General* the discretion to release certain prisoners to
15 serve the latter part of their sentence on home confinement. For
16 implementation, the Attorney General's BOP must make unique, agency
17 specific, determinations. Indeed, for any decision regarding First Step Act
18 sentence end-phase programming (home detention), the Attorney General,
19 via BOP, must make *inter alia* determinations regarding costs, savings,
20 and further find that the offender, if eligible, does not pose a risk of
21 engaging in future criminal conduct or is otherwise a danger. As the
22 statute makes clear, the "Attorney General" is granted the discretion and
23 "may release" some eligible offenders. The "failure to receive relief that is
24 purely discretionary in nature does not amount to a deprivation of a liberty
25 interest." *See Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir.
26 1999) (*citing Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465
27 (1981)).

28 ECF No. 6, pgs. 4-5, n.1.

The Court also finds this argument persuasive. Here, the FSA provides a
mechanism for the BOP to exercise its discretion concerning credits and early release. And as
Respondents note, the denial of early release in the exercise of the BOP's discretion would not
give rise to the deprivation of a liberty interest such as would support Petitioner's claim.
Petitioner does not state a claim upon which relief can be granted under 28 U.S.C. § 2241.

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III. CONCLUSION

Based on the foregoing, the undersigned recommends that Respondents' motion to dismiss, ECF No. 6, be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after being served with these findings and recommendations, any party may file written objections with the Court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: July 29, 2022



DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE